IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1595

COLONIAL PIPELINE COMPANY,
Appellant

versus

E. LEE AGERTON, COLLECTOR OF REVENUE,
Appellee

On Appeal from the Supreme Court of the State of Louisiana

JURISDICTIONAL STATEMENT

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OPINIONS BELOW

The opinion of the Louisiana Court of Appeal, First Circuit, is reported at 275 So.2d 834. The opinion of the Supreme Court of Louisiana, reversing the judgment of the Court of

Appeal, is reported at 289 So.2d 94. The opinions of the Court of Appeal and the Supreme Court, the order denying rehearing and the notices of appeal are set fourth in the Appendix *infra*.

JURISDICTION

This action was brought by appellant, Colonial Pipeline Company, under the authority of Louisiana Revised Statutes 47:1576, for the recovery of taxes assessed and paid under protest. Appellant alleged that the Louisiana corporation franchise tax (La. Rev. Stat. 47:601, et seq as amended by Act No. 325 of the 1970 Legislature) as applied to the facts of this case, is repugnant to Article I, Section 8, Clause 3 of the Constitution of the United States (the Commerce Clause) and therefore invalid. The Louisiana District Court and the Louisiana Court of Appeal, First Circuit, decided the question in favor of appellant and entered judgments directing that the taxes be refunded. The Supreme Court of Louisiana reversed the judgment of the lower courts and held that Louisiana can validly levy an excise tax upon the privilege of engaging in interstate business in Louisiana in a corporate form.

Appellant appeals from the final order and judgment of the Supreme Court of Louisiana entered February 18, 1974, denying appellant's application for rehearing and its judgment entered January 14, 1974, reversing the judgment of the Louisiana Court of Appeal.

Notices of appeal were filed on March 28, 1974 in both the Supreme Court of Louisiana and the Louisiana 19th Judicial District Court.

The validity of a state statute on the grounds of its being repugnant to the Constitution of the United States was drawn in question by the proceedings below, and the decision was in favor of the validity of the statute. Therefore, jurisdiction to review the judgment of the Louisiana Supreme Court, the highest court of the State of Louisiana, by appeal is conferred on this court by 28 U. S. Code, Section 1257(2) and 2101(c). That such jurisdiction exists in the circumstances of this case is sustained by this Court's decision in: *Railway Express Agency v. Virginia*, 347 U. S. 359, 98 L.Ed. 757, 74 S.Ct. 558 (1954) and *Warren Trading Post v. Arizona State Tax Commission*, 380 U. S. 685, 14 L.Ed.2d 165, 85 S.Ct. 1242 (1965).

STATUTES INVOLVED

Sections 401, 601 (before and after its amendment by Act No. 325 of the 1970 Legislature), 606, 1501, 1561 and 1641 of Title 47 of the Louisiana Revised Statutes are set out verbatim in the Appendix, *infra*.

QUESTIONS PRESENTED

1. Whether this Court's decisions in *Spector Motor Service v. O'Connor*, 340 U. S. 602, 95 L.Ed. 573, 71 S.Ct. 508 (1951), *Railway Express Agency v. Virginia*, 347 U. S. 359, 98 L.Ed. 757, 74 S.Ct. 558 (1954) and *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U. S. 389, 95 L.Ed. 436, 72 S.Ct. 424 (1952) are still viable delineations of the limitations imposed by the Commerce Clause of the Federal Constitution upon the power of the states to tax interstate commerce.

2. Whether a corporation engaged exclusively in the interstate transportation of petroleum products in and through

a state, having no local activities except purely incidental to its interstate business, may be constitutionally subjected to Louisiana's corporation franchise tax.

3. Whether Louisiana, which admittedly cannot deny or refuse an out of state corporation the right to engage in interstate business within the state in corporate form, may levy an excise tax upon the privilege of engaging in interstate business in corporate form.

4. Whether the levy of the state excise tax upon the privilege of engaging in interstate business in corporate form, coupled with summary and drastic enforcement and collection procedures which authorize complete cessation of the interstate business, is the equivalent of a state license to engage in interstate commerce and thus prohibited by Article I, Section 8, Clause 3 of the Constitution.

STATEMENT

This is an action for a refund of corporate franchise taxes paid under protest by a corporation engaged exclusively in interstate commerce in Louisiana. It is a sequel to *Colonial Pipeline Company v. Mouton, Collector of Revenue*, 228 So.2d 718, writ refused 231 So.2d 393 (La. 1969).

Subsequent to that case, the Louisiana Legislature amended and reenacted Louisiana Revised Statues 47:601, the franchise tax statute at issue in both cases. That statute is set out verbatim in the Appendix. Colonial is a foreign corporation with its principal office located in Atlanta, Georgia. It has constructed and owns and operates a pipeline system extending from Houston, Texas to the New York Harbor area,

together with various lateral lines, pumping stations, tank farms, and other related facilities. It has been stipulated that all such facilities are used solely and only for the interstate transportation of refined petroleum products.

This pipeline system consists of 1991 miles of main line and 1534 miles of "stub" line, or a total of 3525 miles, of which 258 miles are located in Louisiana.

Colonial is a common carrier of refined petroleum products under the jurisdiction of the Interstate Commerce Commission. Colonial owns none of the products which it transports; all such refined petroleum products are owned by others and are transported at rates fixed in a tariff approved by the Interstate Commerce Commission.

The entire pipeline is operated by means of computerized equipment located in the Atlanta office. All relay stations and booster stations are monitored from Atlanta. The only Colonial personnel stationed in Louisiana during the tax years in question were operators and mechanics required to maintain and operate the pipeline through Louisiana. There were no Colonial administrative personnel in Louisiana during the tax years in question and a division office which formerly was operated in Louisiana was moved from the state prior to the tax years in question.

On May 9, 1962, Colonial qualified to do **interstate** business in Louisiana and has remained so qualified since that time. The state courts determined that the business actually carried on by Colonial has, at all times, been exclusively interstate commerce and all of its facilities have been utilized ex-

clusively in furtherance of its interstate business. Colonial accepts certain deliveries of refined petroleum products from refineries in the Lake Charles, Louisiana area and in the Baton Rouge, Louisiana area. These products are all destined for movement out of Louisiana. Colonial also delivers certain refined petroleum products from Texas refineries to the Baton Rouge and Opelousas, Louisiana stations for use in those areas but Colonial does not engage in any intrastate movement of refined petroleum products in Louisiana. The state concedes that there is no question but that anything and everything done by this corporation since its original entry into the state of Louisiana has been purely incidental to its business as a common carrier engaged soley in interstate commerce.

Colonial has paid and is paying Louisiana some $100,000.00 annually in income taxes based upon the apportionment formula in Louisiana's income tax law; the company is paying in addition, some $370,000.00 in state and local ad valorum taxes on property owned by it in Louisiana.

In the first *Colonial* case, the Louisiana Court of Appeal held that the Louisiana corporation franchise tax (L.R.S. 47:601, et seq) was levied upon the privilege of engaging in business in Louisiana; since Colonial was engaged exclusively in interstate business, the court held that the tax could not be constitutionally applied to Colonial. The Supreme Court of Louisiana declined to review that judgment, declaring that there was "no error of law in the judgment" (231 So.2d 393). In 1970, the Louisiana Legislature adopted an amendment to Section 601 and thereafter the State Collector of Revenue again concluded that Colonial was liable for corporation franchise taxes.

Colonial paid those taxes for the years 1970 and 1971 under protest and then filed this suit for refund, in accordance with the provisions of state law. For 1970 the amount of tax assessed is $80,835.02[1] and for 1971 the amount is $69,884.78.

The Louisiana District Court and Court of Appeal, First Circuit, both held that the 1970 amendment did not change the operating incidence of the corporation franchise tax and that it could not be constitutionally applied to Colonial.

The Supreme Court of Louisiana granted a writ of review and held that the operating incidence of the tax even before the 1970 amendment was upon the privilege of engaging in business in Louisiana **in corporate form** rather than simply upon the privilege of engaging in business in Louisiana. The Supreme Court of Louisiana handed down its decision reversing the judgment of the Louisiana Court of Appeal on January 14, 1974, and that court handed down its final order and judgment denying appellant's application for rehearing on February 18, 1974. Notices of appeal were filed on March 28, 1974 in both the Supreme Court of Louisiana and the Louisiana 19th Judicial District Court.

THE QUESTIONS ARE SUBSTANTIAL

This appeal presents substantial constitutional questions involving the extent of the taxing power of the states over foreign corporations engaged exclusively in interstate transportation. In *Spector Motor Service v. O'Connor*, 340 U. S. 602, 95 L.Ed. 573, 71 S.Ct. 508 (1951) and *Railway Express*

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[1] The Louisiana Supreme Court held that Colonial was liable only for the minimum tax for 1970 and reduced this amount.

Agency v. Virginia, 347 U.S. 359, 98 L.Ed. 757, 74 S.Ct. 558 (1954) (the first *Railway Express* case) this Court made it plain that Article I, Section 8, Clause 3 of the Constitution of the United States prohibits a state franchise tax, the operating incidence of which falls upon the privilege of carrying on exclusively interstate transportation in and through the state. In *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389, 96 L.Ed. 436, 72 S.Ct. 424 (1952), this Court made it equally plain that it would not permit the states to "carve out" an "incident from the integral economic process of interstate commerce" as the operating incidence of an excise tax, for to do so would result in "a local obstruction to the flow of interstate commerce that cannot stand under the Commerce Clause."

The decision of the Supreme Court of Louisiana sustaining the Louisiana excise tax levied upon Colonial's franchise for the privilege of carrying on exclusively interstate transportation in the state **in corporate form** is but the latest in a series of state court decisions maintaining successively more direct state levies upon interstate commerce. This appeal raises for determination just how far the states may constitutionally go in taxing exclusively interstate business through the device of fragmentizing the "doing business" concept, and by a tax levied on one fragment of the entire economic process of doing interstate business, impose a privilege, license or franchise tax on the interstate business itself.

We take it as established that appellant's **right** to engage in the intersate transportation business in Louisiana is not subject to that state's grant or denial, and thus not subject to that state's taxing power. *Nippert v. City of Richmond*,

327 U.S. 416, 90 L.Ed. 760, 66 S.Ct. 586 (1946). We further take it as established that appellant's **right** to engage in interstate business in Louisiana in corporate form is not subject to that state's grant or denial, and that a license, privilege or occupation tax levied upon the privilege of engaging in interstate business is invalid. *Spector Motor Service, supra.* Nonetheless, Louisiana has declared in effect: while we acknowledge that we cannot levy a tax upon a corporation's franchise to do interstate business, we can and do tax the corporation's franchise to do such business **in the corporate form.** To accomplish this, Louisiana has reinterpreted its franchise tax statute, redesignating the operating incidence of tax as a tax on doing business in corporate form (representing the taxable local incident) as a means of avoiding the "doing business" concept; thus further fragmenting it.

We say that Louisiana has "reinterpreted" its franchise tax, for in 1969, the Louisiana courts construed the Louisiana corporation franchise tax to be an exaction levied upon the privilege of doing business in Louisiana and, citing *Spector Motor Service, supra*, held that the tax could not be constitutionally applied to Colonial because Colonial was engaged exclusively in the interstate transportation of refined petroleum products in and through that state. *Colonial Pipeline Company v. Mouton*, 228 So.2d 718, writs refused 231 So.2d 393 (La. 1969). After the Louisiana Legislature adopted an amendment to the statute[2] which did not change the nature or incidence of the franchise tax,[3] the Supreme Court of Lou-

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[2] Act No. 325 of 1970, amending L.R.S. 47:601; set out in the Appendix, *infra.*

[3] There was dispute as to the effect of the 1970 amendment but the Louisiana Supreme Court held that assuming there has been no essential

isiana held in the present case that the state could constitutionally tax Colonial's interstate transportation business because it was not taxing "the general privilege of doing interstate business" but the privilege of doing that business in corporate form, predicating the tax upon privileges enjoyed by corporations.

The basis of the state court holding is summed up in the following language of the opinion:

> "The fact that the corporate form of doing business is inextricably interwoven in a foreign corporation's doing business in the State, does not in our view detract from the fact that the local incident taxed is the **form of doing business** rather than the business done by that corporation. And it is our view that the local incident is real and sufficiently distinguishable, so that taxation thereof does not, under the controlling decisions of the United States Supreme Court, violate the Commerce Clause." (Appendix, page 40; emphasis by the Court)

The Louisiana Supreme Court, as well as the highest courts of other states, has seized upon certain decisions of this Court as signifying a retreat from the clear holdings of cases such as *Spector Motors, Railway Express*, and *Memphis Steam, supra.* The state court here concludes that the following decisions of this Court demonstrate "inroads into the tax immune status of exclusively interstate activity." (Appendix, p. 37).

Memphis Natural Gas Company v. Stone, 335 U.S. 80,

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change in the statute it would nevertheless hold as it did, not withstanding the earlier contrary decision of the Louisiana Court of Appeal in which writs were refused. See Appendix, p. 32.

92 L.Ed. 1832, 68 S.Ct. 1475 (1948), although decided prior to *Spector Motors*, is one of those cases frequently cited. That case involved a gas pipeline company which actually made sales of its products in Mississippi. This Court held that it was bound by the determination of fact made by the Mississippi Supreme Court that certain of the corporation's activities in Mississippi were of a local nature, sufficiently separate and apart from the flow of commerce to support state taxation. The tax involved in *Memphis Gas* was measured by capital stock, basically therefore, a property measure, similar to the "in lieu" tax subsequently approved in *Railway Express*, *infra*.

Here, appellant is a common carrier of refined petroleum products, operating under the jurisdiction of the Interstate Commerce Commission. Colonial makes no sales of any sort in Louisiana; its business is purely interstate transportation of refined petroleum products for others at tariffs approved by the Interstate Commerce Commission. As was the fact situation in *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555, 69 L.Ed. 439, 45 S.Ct. 184 (1925), all of Colonial's activities within the state of Louisiana are admittedly, ". . . exclusively in furtherance of its interstate business, and the property itself, however extensive or of whatever character, * * * likewise devoted only to that end. They were the means and instrumentalities by which that business was done and in no proper sense constituted, or contributed to, the doing of a local business." (266 U.S. at 565, 69 L.Ed. at 443, 45 S.Ct. at 184).

In addition, unlike the tax in *Memphis Gas*, the Louisiana franchise tax includes "surplus, undivided profits, and borrowed capital" in the tax base, as a consequence of which

stocks and bonds physically located outside the State of Louisiana are includible in the allocation formula. *Kansas City Southern Railway Co. v. Reily*, 242 La. 235, 135 So.2d 915, appeal dismissed, 370 U.S. 289, 8 L.Ed.2d 501, 82 S.Ct. 1561 (1962).

Another decision relied upon by the state court is *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 3 L.Ed.2d 421, 79 S.Ct. 357 (1959), in which this Court sustained a properly apportioned state net income tax levied upon a corporation engaged in interstate commerce. Louisiana and other states have used this decision as justification for disregarding *Spector Motor Service*, and for approving state franchise tax levies upon exclusively interstate business, despite the positive recognition in *Northwestern* that *Spector Motor Service* "was not a levy on net income, but an excise or tax placed on that franchise of a foreign corporation engaged 'exclusively' in interstate operations." Moreover, Colonial pays and has not complained about the levy of the substantial income tax imposed upon net income by Louisiana, but it does complain about paying both, particularly when appellant is also paying substantial amounts of state and local ad valorem taxes on property owned by it in Louisiana.

Railway Express Agency v. Virginia, 358 U.S. 434, 3 L.Ed. 2d 450, 79 S.Ct. 411 (1959) (the second *Railway Express* case) is also taken by the state court as an erosion of this Court's prior holdings in *Spector*, and in the earlier case of *Memphis Steam Laundry Cleaner, Inc. v. Stone*, all despite the refusal of this Court in *Memphis Steam* to permit fragmentation of the "doing business' concept:

"If the Mississippi tax is imposed upon the privilege of

soliciting interstate business, the tax stands on no better footing than a tax upon the privilege of doing interstate business." (342 U.S. at p. 393, 96 L.Ed. at p. 440)

To paraphrase here "if the Louisiana tax is imposed upon the conduct of interstate business in corporate form," then it stands on no better footing than a tax upon the privilege of doing Colonial's interstate business. This state court reliance upon *Railway Express* as representing a departure from these fundamental principles is obviously misplaced. The significant distinction between the tax in *Railway Express* and the Louisiana franchise tax is that the Virginia tax was levied *in lieu* of all other taxes on intangible property and in lieu of property taxes on the rolling stock of the corporation. In sustaining the Virginia tax, this Court was careful to point out that it was not "denominated a license tax laid in the 'privilege of doing business in Virginia,' " nor was it "in addition to the property tax," nor was it "a condition precedent to its engaging in interstate commerce in the Commonwealth." It was, in substance, a tax on property, permissible under a long line of cases approving state property taxes as an indirect levy.

The Louisiana tax does not purport to be *in lieu* of any of the other taxes which appellant is paying; it is by any name or interpretation, still a license tax on the privilege of doing business, and as we shall hereafter indicate, it is an effective condition precedent to Colonial's engaging in interstate commerce in Louisiana.

General Motors Corp. v. Washington, 377 U.S. 436, 12 L.Ed.2d 430, 84 S.Ct. 1564 (1964), likewise cited as support for fragmentation of the "doing business" concept, involved a state tax levied upon the corporation and measured by Gen-

eral Motors' substantial gross wholesale sales of motor vehicles in the state. The tax was sustained because of the company's extensive and undisputed local activity in connection with those sales, which activity was sufficiently separate and distinct from the flow of interstate commerce to support the tax. As pointed out above, Colonial here is a common carrier of refined petroleum products, owns no products, and makes no sales in Louisiana.

The trend among the states has been one of steady expansion of this Court's prior holdings and a correspondingly increasingly heavy burden upon interstate commerce, as is illustrated by the state court decisions discussed below.

The Supreme Court of Oklahoma initiated the erosion of this Court's holding in *Spector Motor Service* within a month after this Court announced its opinion. On April 24, 1951, the Oklahoma court decided *Great Lakes Pipe Line Co. v. Oklahoma Tax Commission*, 251 P.2d 655 (Okla. 1951). That case involved an interstate pipeline and an Oklahoma corporation license tax levied "as a condition of existing or doing or attempting to do business in this State measured by capital used, invested or employed in the State." The state court found as a fact that Great Lakes "definitely engaged in intrastate commerce during the period for which it was taxed" (231 P.2d at 659). The opinion, however, contains language to the effect that the tax is being levied not only on the basis of the intrastate commerce but by reason of some fancied distinction between doing business and doing business in a corporate capacity. The Oklahoma court distinguished *Spector Motor Service* as follows:

"In that case the right to exist was not taxed, but only

the privilege of carrying on or doing business in the state of Connecticut . . ." (231 P.2d at 661)

Apparently no attempt was made to secure this court's review of the Oklahoma decision and the finding that the taxpayer was engaged in intrastate as well as interstate business was sufficient to support the levy of the tax under *Spector Motor Service* and prior decisions of this court.

The "inroads" approach of the Oklahoma decision was adopted by the Tennessee Supreme Court in *Texas Gas Transmission Corp. v. Atkins*, 270 SW2d 384 (Tenn. 1954). In that case, the taxpayer did intrastate business in Tennessee; it made sales of gas in the state of Tennessee as well as purchases of gas in that state. In addition, the company had voluntarily qualified to do **intrastate** business in Tennessee thereby gaining rights and privileges which it otherwise would not have acquired. The Tennessee court, however, concluded that the excise tax in question was levied upon the right to do business in Tennessee in corporate form and distinguished *Spector Motor Service* on that basis. Again, the state court fragmented the doing business concept, seizing upon the privilege of engaging in business in corporate form in the state, together with admitted local activities involved in the sale and purchase of gas and the voluntary qualification to do intrastate business as justification for the tax. Again, apparently no attempt was made to secure this court's review of that opinion; but, in any event, the case is clearly distinguishable, both under the facts and the law, from the instant case.

The case of *Roadway Express, Inc. v. Director*, 50 N.J. 471, 236 A.2d 577 (1967, appeal dismissed), 390 U.S. 745, 20 L.Ed. 276, 88 S.Ct. 1443 (1968) involved a motor freight truck-

ing company conducting interstate commerce involving substantial local activities and property. The New Jersey business corporate tax was levied upon all corporations "in lieu of other State, county or local taxation upon or measured by intangible personal property." The measure of the tax was allocated net worth plus allocated net income. New Jersey did not levy an income tax and the state court commented that the business corporation tax has all the attributes of a direct levy on income (236 A.2d at 582). The New Jersey Supreme Court sustained the validity of the tax upon the basis of its "in lieu" features and upon the corporation's substanial local activities, specifically, its vehicles which were registered elsewhere did not pay license fees to New Jersey but made extensive use of the state's highway system and the vehicles and cargoes enjoyed the protection of the state police. The court commented, however, after reviewing this Court's recent cases, that the minority view of *Spector Motor Service* has now become this Court's general view (236 A.2d 585).

This Court's dismissal of the appeal in the New Jersey case for want of a substantial federal question is fully supported by *Spector Motor Service* and other cases predicated upon the substantial local activities of the corporation and more particularly the "in lieu" features of the tax which this Court had approved in the second *Railway Express Agency* case in 1959. The language of the state court opinion, however, indicates a tendency to ignore the Commerce Clause as a viable restraint upon the state's taxing power.

Mid-Valley Pipeline Co. v. King, 431 S.W.2d 277 (Tenn. 1968); appeal dismissed, 393 U.S. 321, 21 L.Ed.2d 517, 89 S.Ct. 556 (1969) involved an excise tax levied upon allocated net

earnings and a franchise tax levied upon capital stock surplus and undivided profits. The Tennessee Supreme Court sustained the application of the tax to an interstate common carrier of crude oil citing the New Jersey case and the earlier Tennessee case of *Texas Gas Transmission Corp. v. Atkins, supra.* The court held that local incidents or activities may be a basis for a franchise or excise tax, measured by properly apportioned net income of a foreign corporation engaged solely in interstate commerce, provided the local activities can be separated from interstate commerce. The court further held that the company has and is employing or owning capital or property in Tennessee and exercising its corporate franchise within Tennessee and that it maintains its rights of way and other valuable properties located in the state in its corporate capacity and further that it has and is using Tennessee courts to vindicate its rights. The Tennessee court held that these local activities, although incidental to the conduct of interstate commerce are taxable under the decisions of this court.

While the court did not specifically note that point, the Tennessee tax apparently had "in lieu" features since it was levied upon foreign corporations doing business in the state without qualifying to do business "as a recompense for the protection of their local activities and as compensation for the benefits they receive from doing business in Tennessee."

As noted above, this Court dismissed the appeal for want of a substantial federal question.

While each of these state court decisions may be justified upon the peculiar facts and particular state statutory provisions, they illustrate the continuing "inroads" into the heretofore generally accepted excise tax immunity of businesses

engaged exclusively in interstate commerce. The Louisiana Supreme Court decision is the latest and most far-reaching of these decisions. We submit that the time has come for this Court to re-affirm the Commerce Clause as the intended safeguard against the free movement of goods between the states. In the final analysis, if the state cannot exact a levy as a condition of commencing interstate business, it ought not to be permitted, under the guise of fragmentation to exact a levy which must be paid as a requirement for continuing the conduct of an interstate business in the state.

We suggest to the Court that the Louisiana corporation franchise tax, although couched in more sophisticated grammar, is actually the equivalent of the Kentucky license tax upon foreign corporations which this Court struck down in *Crutcher v. Kentucky*, 141 U.S. 47, 35 L.Ed. 649, 11 S.Ct. 851. Louisiana seeks to justify its tax by contending it is not a tax upon the privilege of doing interstate business, but is a **tax upon foreign corporations doing interstate business.**

A few references to the Louisiana Supreme Court's construction of the tax levy will make this plain:

> "The thrust of the statute is to tax not the interstate business done in Louisiana by a foreign corporation, **but the doing of business in Louisiana in a corporate form** . . ." (Appendix, p. 33; emphasis supplied)

> ". . . (The statute) taxes not the general privilege of doing interstate business but simply the corporation's privilege of enjoying in a corporate capacity the ownership or use of its capital, plant or other property in this State, the corporation's privilege of exercising and continuing its corporate charter in the State of Louisiana,

and the corporation's use of its corporate form to do business in the State." (Appendix, p. 39)

". . . the local incident taxed is the **form of doing business** rather than the business done by the corporation . . ." (Appendix, p. 40; emphasis by the Court)

In *Crutcher v. Kentucky, supra*, the state sought to sustain its license tax upon foreign corporations doing interstate business upon the grounds that the tax was non-discriminatory and levied upon local corporations as well. This Court held:

". . . **to carry on interstate commerce is not a franchise or a privilege granted by the state**; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities as a matter of convenience in carrying out their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.

* * *

"We have repeatedly decided that a state law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it." (141 U.S. at 58, 35 L.Ed. at 652)

See also *International Text-Book Co. v. Pigg*, 217 U.S. 91, 107, 54 L.Ed. 678, 685, 30 S.Ct. 481 (1910); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 66 L.Ed. 239, 42 S.Ct. 106; and *Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276, 6 L.Ed.2d 288, 81 S.Ct. 1913 (1961).

Although the Louisiana tax is couched in terms of the

levy of a corporation franchise tax, it is the equivalent of a license tax because the state can completely shut off the flow of commerce in connection with the levy and collection of the tax. As pointed out above, the payment of the tax is a condition precedent to the continuing conduct of interstate business in Louisiana. Under these circumstances, it should have no greater standing than the exaction of a levy as a condition of commencing interstate business in the state.

Failure to pay the Louisiana tax is a criminal offense (La. Rev. Stat. 47:1641); enforcement of the tax liability may be by summary process, distraint and injunction (La. Rev. Stat. 47:1501, 47:401, 47:1561).

Had not Colonial paid the franchise tax under protest, the state could have, without notice or assessment, instituted summary proceedings and the alleged tax would have operated as a "lien, privilege and mortgage on all of the property" of Colonial in the State of Louisiana. In addition, the state could have, at its option, used the drastic remedy of distraint and could have demanded and taken possession of appellant's property in Louisiana. Under these circumstances, the holding of the Court of Appeal in *Ideal Cement Co. v. United Gas Pipe Line*, Fifth Circuit, 1960, 282 F.2d 574 (cert. denied, 369 U.S. 837, 7 L.Ed.2d 842, 82 S.Ct. 863), is apropos here:

> "• • • What the City has done in this case, by the words of its ordinance, is to make the procurement of a license a precondition of engaging in interstate commerce within its jurisdiction.
> "Nor is the evil attending license taxes on interstate commerce merely a question of labels. Provisions for the levy of license taxes are ordinarily accompanied by summary collection procedures. So here, the Alabama Code pro-

vides for injunctions against firms who fail to pay municipal license taxes on time. Thus, the effect of nonpayment of a license tax is not the usual slight disruption of commerce which may follow a levy on a delinquent taxpayer's property. Rather, interstate commerce is brought to an immediate halt by means of the injunctive remedy. Moreover, doing business without a license will bring down the violator extreme criminal sanctions."

In *Crutcher v. Kentucky, supra*, the state's tax was an outright license tax imposed upon foreign corporations who wished to do business in Kentucky. The Louisiana statute as construed by the state's highest court is a franchise tax imposed upon foreign corporations who wish to do interstate business in corporate form[4] in Louisiana. Louisiana cannot deny appellant's right to do business in the corporate form in Louisiana. *Crutcher v. Kentucky* holds that the power of Congress over interstate commerce is as absolute as it is over foreign commerce and points out that the prerogative, the responsibility and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce belong to the government of the United States and not to the governments of the several states. Further, *Crutcher* holds: "and the same thing is exactly true with respect to interstate commerce as it is with respect to foreign commerce." (141 U.S. at 58)

Thus it is plain that Colonial's privilege of engaging in interstate transportation in and through Louisiana **in corporate form** flows from the United States, not the state.

Tests or questions propounded in earlier decisions of this

[4] We take it as self-evident that a corporation cannot do business, interstate or otherwise, in other than its corporate capacity.

Court and alluded to by the State court become pertinent: "whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded." (*General Motors v. Washington, supra*, 377 U.S. at 441); "the controlling question is whether the State has given anything for which it can ask return." (*Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 85 L.Ed. 267, 61 S.Ct. 246 (1940))

While Colonial owns property in Louisiana which receives protection from state and local authorities, Colonial pays substantial ad valorem and income taxes for whatever "opportunities and protections" flow from property ownership.

Under *Crutcher v. Kentucky, supra*, to carry on interstate commerce in corporate form is not a right or privilege granted by the state; thus Louisiana has not afforded to appellant the very "operating incidence" upon which it seeks to levy the tax. **And since Louisiana has not given appellant the right or privilege of doing interstate business in corporate form, the state cannot ask a return for it.**

As construed by Louisiana's highest court, the state tax is levied upon appellant's privilege of carrying on interstate commerce in corporate form. That is not a privilege bestowed by Louisiana and the practical result of the statute is to require out-of-state corporations to take out a license for carrying on interstate commerce.

While great respect is due the determination of the operating incidence of a state tax, *Memphis Natural Gas v. Stone, supra*, it is not conclusive upon this Court, which must

consider and determine the practical effect of the tax upon interstate commerce, first *Railway Express* case, and second *Railway Express* case, *supra*.

The practical operating result of the Louisiana tax is a privilege, license or occupation tax upon appellant's interstate transportation business in circumstances where Louisiana does not contribute to the furtherance of that interstate business, and under circumstances where Louisiana can shut off the flow of interstate commerce through collection procedures which compel a cessation of Colonial's interstate business in the absence of payment.

CONCLUSION

For the reasons stated, these important constitutional issues warrant this Court's consideration of the growing extension of state taxation upon interstate commerce culminating in Louisiana's holding that it is constitutionally permitted to exact a tax for the privilege of doing interstate business in corporate form in Louisiana. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

R. Gordon Kean, Jr. and

John V. Parker of
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PROOF OF SERVICE

The undersigned, one of the attorneys for Colonial Pipeline Company, plaintiff-appellant herein and a member of the Bar of the Supreme Court of the United States hereby certifies that on the _____ day of April, 1974, I served a copy of the foregoing Jurisdictional Statement on Joseph N. Traigle, successor in office to E. Lee Agerton, Collector of Revenue, defendant-appellee herein, by mailing a copy of the same in an addressed envelope with postage prepaid to his counsel of record, Whit M. Cook II, State of Louisiana, Department of Revenue, Legal Division, Post Office Box 201, Baton Rouge, Louisiana 70821.

Baton Rouge, Louisiana, this _____ day of April, 1974.

R. Gordon Kean, Jr.

APPENDIX A

OPINIONS BELOW

MONDAY JAN 14 1974

SUPREME COURT OF LOUISIANA

No. 53,552

COLONIAL PIPELINE COMPANY,
Plaintiff-Respondent

versus

E. LEE AGERTON, COLLECTOR OF REVENUE,
Defendant-Relator

Writ of Review to the Court of Appeal, First Circuit

CALOGERO, Justice.

We granted this writ, 278 So.2d 201 (La. 1973) upon the application of the Louisiana Collector of Revenue, who complains of an adverse decision of the 19th Judicial District Court, affirmed by the First Circuit Court of Appeal, holding that R.S. 47:601 as amended by Act No. 325 of 1970 is unconstitutional as a violation of the Commerce Clause of the United States Constitution.[1]

R.S. 47:601 imposed a corporation franchise tax which the Collector levied on plaintiff-relator, Colonial Pipeline Company, for the years 1970 and 1971. Colonial paid the taxes under protest, then instituted this action for recovery.

The legal issue involved in the matter presently before us is more readily understood by reviewing Colonial's disputes with the Collector of Revenue starting in 1963.

Colonial Pipeline Company is a common carrier of liquefied petroleum products. Its chief physical asset is a pipeline system stretching from Houston, Texas, to the outskirts of

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[1] U.S. Const. art. 1, §8, cl. 3.

New York City, a total of some 3,400 miles. Through this line, Colonial pumps approximately one million gallons of petroleum products per day. Of the total pipeline mileage owned by Colonial, approximately 258 are located in the State of Louisiana (in 1963 there were 217 miles of pipeline located in Louisiana.). Over this distance, there are several booster pumping stations which keep the products flowing at a sustained rate, and at various collection points (chiefly Lake Charles and Baton Rouge) there are tank storage facilities. To maintain and help operate this line, Colonial keeps approximately 25-30 employees in the State. These consist of various classifications of mechanics, electricians, and other workers whose chief duties are to inspect the line and perform maintenance chores. There were no administrative offices or personnel in the State during 1970 and 1971, although prior to this time, including the year 1963, Colonial had maintained a Division office in Baton Rouge.

In its operation in Louisiana, Colonial has apparently done no intrastate shipping of petroleum products. Loads or batches are picked up outside the state and deposited within the state, and picked up within the state for transportation elsewhere. There are apparently no facilities in the state, except for those in Lake Charles and Baton Rouge, for injecting or withdrawing products into or from the line.

On May 9, 1962, Colonial, a Delaware corporation with principle offices in Atlanta, Georgia, qualified to do business in Louisiana and has remained qualified since that time.

In 1963 the Collector imposed the Louisiana franchise tax (R.S. 47:601, the latest amendment thereof in 1963 being by Act 437 of 1958) on Colonial's activities for the year 1962. Colonial paid the tax, then successfully prosecuted a lawsuit for a refund. The Court of Appeal in that first lawsuit affirmed

a district court judgment favorable to Colonial,[2] holding that Colonial was engaged in interstate commerce, and that the Collector's interpretation of R.S. 47:601 which authorized the imposition of the tax was unconstitutional as a violation of the Commerce Clause of the United States Constitution. This Court refused to grant writs.[3]

Following that 1969 decision the Louisiana Legislature by Act 325 of 1970 amended R.S. 47:601 in an apparent effort to cure any Constitutional deficiency in the statute and to facilitate the legal imposition of Louisiana's cooperation franchise tax upon corporations such as Colonial.

There followed a renewed effort to impose the tax, this time under the amended statute.

Prior to the 1970 amendment the statute had read as follows:

R.S. 47:601 Imposition of tax

> Every domestic corporation **and every foreign corporation**, exercising its charter, authorized to do or doing business in this state, or owning or using any part or all of its capital or plant in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this chapter, **shall pay a tax** at the rate of one dollar and 50/100 ($1.50) for each one thousand dollars ($1,000.00), or major fraction thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital, determined as hereinafter provided; the minimum tax shall not be less than ten dollars ($10.00) in any case. **The tax levied herein is due and payable for the privilege of carrying on or doing business, the exercising of its charter or the continuance of its charter**

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[2] Colonial Pipeline Co. v. Mouton, 228 So.2d 718 (La.App. 1st Cir. 1969).
[3] 255 La. 474, 231 So.2d 393 (1970).

within this state, or owning or using any part or all of its capital or plant in this state. (Emphasis added)

The amendment by Act 325 of 1970 changed the statute to provide as follows:

R.S. 47:601 Imposition of tax

Every domestic corporation **and every foreign corporation, exercising its charter, or qualified to do business or actually doing business in this state, or owning or using any part or all of its capital, plant or any other property in this state**, subject to compliance with all other provisions of law, except as otherwise provided for in this Chapter **shall pay** an annual tax at the rate of $1.50 for each $1,000.00, or major fraction thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital, determined as hereinafter provided; the minimum tax shall not be less then $10.00 per year in any case. **The tax levied herein is due and payable on any one or all of the following alternative incidents:**

(1) **The qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form.** The term "doing business" as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services of property.

(2) **The exercising of a corporation's charter or the continuance of its charter within this state.**

(3) **The owning or using any part or all of its capital plant or other property in this state in a corporate capacity.**

It being the purpose of this section to require the payment of this tax to the State of Louisiana by domestic corporations for the right granted by the laws of this state

to exist as such an organization, **and by both domestic and foreign corporations for the enjoyment, under the protection of the laws of this state, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation.** The tax hereby imposed shall be in addition to all other taxes levied by any other statute.

As used herein the term "domestic corporation" shall mean and include all corporations, joint stock companies or associations, or other business organizations organized under the laws of this state which have privileges, powers, rights or immunities not possessed by individuals or partnerships. The term "foreign corporation" shall mean and include all such business organizations as hereinbefore described in this paragraph which are organized under the laws of any other state, territory or district, or foreign country. (Emphasis added)

The Court of Appeal, holding as it did in the earlier opinion that the statute (prior to the 1970 amendment) as applied to Colonial's activities within the State violated the commerce clause of the United States Constitution, rested the decision essentially upon its construction that the statute imposed a tax simply upon the privilege of doing business in the State of Louisiana. And, of course, State franchise or excise taxes imposed on a corporation for the privilege of doing exclusively interstate business, as a general rule, are invalid.

Colonial argues, and the Court of Appeal in the case presently before us held, that the 1970 amendment to R.S. 47:601 did not change the operating incidents of the franchise tax, that the statute before and after the amendment in this respect is essentially the same.

We disagree. The amended statute omits the primary operating incident, i.e., "the privilege of carrying on or doing business." And, of course, it was the taxing of the privilege of carrying on or doing business which the Court of Appeal

in its earlier decision held was the exclusive thrust of the statute. Additionally the amendment specifies three alternative incidents, one of which, "the doing of business within this state in a corporate form," was not clearly incorporated in the prior statute.

Even if we assume, however, that there has been no essential change in the statute, we would still be inclined to hold as we do, notwithstanding the earlier decision of the Court of Appeal to the contrary.

This Court's refusal in 1969 to grant writs upon application by the State in that earlier case, while normally persuasive, does not carry the same weight as a precedent as it would, had that case been decided by this Court after the granting of a writ. See *State v. Theard*, 212 La. 1022, 34 So.2d 248 (1948), *State v. Ardoin*, 197 La. 877, 2 So.2d 633 (1941). This Court is not bound by its refusal of writs, to adopt law expressed in appellate court opinions. Garlington vs. Kingsley, #53,675 on the docket of this Court, handed down this day. __ So.2d __ (La. 1973).

The statute as amended in 1970 imposes a corporation franchise tax upon, pertinently, every foreign corporation (and every domestic corporation as well) exercising its charter, authorized to do or doing business, or owning or using any part or all of its capital or plant, in the State of Louisiana. The tax is due and payable on any one or all of three alternative incidents:

a) doing business in Louisiana in a corporate form

b) the exercising of a corporation's charter or the continuance of its charter within the state and

c) the owning or using any part or all of its capital, plant or other property in Louisiana in a corporate capacity.

The thrust of the statute is to tax not the interstate business done in Louisiana by a foreign corporation, but the doing of business in Louisiana in a corporate form, including

> "each and every act, power, right, privilege or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations . . ."

The pertinent Constitutional question is whether, as applied to a corporation whose exclusive business carried on within the State is interstate, this statute violates the Commerce Clause of the United States Constitution.

Memphis Natural Gas Co. v. Stone, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832 (1948), involved facts almost identical to the case at point. There the gas company piped gas across the State of Mississippi. It did no intrastate business in that State. It had no office in that State and no employees other than those necessary to maintain the pipeline. Unlike the case before us Memphis Natural Gas had not qualified to do business in Mississippi. The Mississippi tax statute in question was a franchise or excise tax very similar to our Louisiana statute. The pertinent part of the Mississippi statute provided:

> "It being the purpose of this section to require the payment to the state of Mississippi, this tax for the right granted by the laws of this state to exist as such organization, and enjoy, under the protection of the laws of this state, the powers, rights, privileges and immunities derived from the state by the form of such existence."

The Supreme Court of Mississippi concluded the statute did not attempt to tax interstate commerce. That Court said:

> "It is to be seen that **there is no attempt to tax interstate commerce as such, but the levy is an exaction which the State requires as a recompense for its protection of lawful activities carried on in this State by the corpora-**

> **...stic, activities which are incidental to ... ...rileges possessed by it by the nature of it... ...—here the local activities in maintaining, keeping ... ...air, and otherwise in manning the facilities of the s... ...throughout the 135 miles of its line in this State."** (Emphasis added) 201 Miss. 670, 674, 29 So.2d 268, ...).

In affirming the Supreme Court of Mississippi, the Supreme Court of the United States said:

> "We think that the State is within its constitutional rights in exacting compensation under this statute for the protection it affords the activities within its border. **Of course, the interstate commerce could not be conducted without these local activities. But that fact is not conclusive. These are events apart from the flow of commerce.** This is a tax on activities for which the state, not the United States, gives protection and the state is entitled to compensation when its tax cannot be said to be an unreasonable burden or a toll on the interstate business." 335 U.S. at 96, 68 S.Ct. at 1483, 92 L.Ed. at 1844 (Emphasis added)

With respect to whether or not the imposition of this tax is an unreasonable burden or toll on interstate business, it is pertinent to note that the Court of Appeal below indicated that R.S. 47:601 imposes a tax upon the total corporate structure of Colonial. It went on to comment that if each State, in which a foreign corporation engaged exclusively in interstate commerce, could impose a franchise tax based on that corporation's total capital stock, surplus, undivided profits and borrowed capital, the tax burden would be such as to literally prevent the corporation's interstate operation.

On the contrary, however, the statute does not impose a tax upon the total corporate structure of Colonial. R.S. 47:606 specifically apportions the capital stock, etc. of any

corporation subjected to the franchise tax according to the property and assets situated or used in Louisiana.[4]

Colonial argues that *Memphis Natural Gas, supra*, is not perfectly analogous and that, at any rate, it is an isolated decision of the United States Supreme Court at odds with the later decision in *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951). Conversely, the Collector argues that *Spector* does not overrule *Memphis Natural Gas* either expressly or impliedly and that under any condition *Spector* is the isolated decision of the United States Supreme Court and that later decisions of that Court, namely, *General Motors Corp. v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964), *Railway Express Agency v. Virginia*, 358 U.S. 434, 79 S.Ct. 411, 3 L.Ed.2d 450 (1959), *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959), indicate further inroads (even more significant than that involved in *Memphis Natural Gas*) into the tax immune status of exclusively interstate business activity. It is appropriate therefore that we review those decisions of the United States Supreme Court.

In *Spector*, there was a State tax or excise upon the franchise of a corporation **for the privilege of carrying on or doing business in the State**, measured by net income received from

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[4] R.S. 47:606 Allocation of taxable capital.

A. General allocation formula.

For the purpose of ascertaining the tax imposed in this Chapter, every corporation subject to the tax is deemed to have employed in this state the proportion of its entire issued and outstanding capital stock, surplus, undivided profits and borrowed capital, computed on the basis of the ratio obtained by taking the arithmetical average of the following ratios:

(1) . . .

(2) The ratio that the value of all of the taxpayer's property and assets situated or used in Louisiana bears to the value of all of its property and assets wherever situated or used. . . .

business transactions within that State. As imposed upon a foreign corporation doing only interstate business within the State, the tax was held invalid under the Commerce Clause. The Court in *Spector* said however,

> "The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the power of the State and nondiscriminatory." 340 U.S. at 609, 71 S.Ct. at 512, 95 L.Ed. at 578.

In 1964, the United States Supreme Court in *General Motors Corp. v. Washington, supra*, validated a State tax upon a foreign corporation's gross wholesale sales of cars, parts and accessories within the State, finding the levy was upon a significant local incident, namely substantial local business activity of the corporation. In *General Motors Corp.* the Court said the decisive question relative to the operating incident of the tax was "whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded." It also stated "the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation." 377 U.S. at 441, 84 S.Ct. 1568, 12 L.Ed.2d at 435.

Then in 1959, the Supreme Court decided *Northwestern States, Portland Cement Co. v. Minnesota, supra*, which involved the constitutionality of non-discriminatory state net income tax laws levying taves on that portion of a foreign corporation's net income earned from and fairly apportioned to business activities within the taxing State, even though

such activities were exclusively in furtherance of interstate commerce. The Supreme Court held the statute not constitutionally infirm if the levy is not discriminatory and is properly apportioned to the activity within the taxing state. It found the in-state activities to form "a sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction.' " 358 U.S. at 464, 79 S.Ct. at 365-66, 3 L.Ed.2d at 431. The Supreme Court quoted *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 61 St.Ct. 246, 85 L.Ed. 267 (1940), " 'the controlling question is whether the State has given anything for which it can ask return.' " 358 U.S. at 465, 79 S.Ct. at 366, 3 L.Ed.2d at 431.

In *Railway Express Agency v. Virginia, supra*, decided the same day as *Northwestern States Portland Cement*, the Supreme Court held valid a francise tax in lieu of taxes upon all of its other intangible property and in lieu of property taxes on its rolling stock measured by gross receipts from transportation within Virginia.

We believe that the decisions of the United States Supreme Court following *Memphis Natural Gas* and *Spector*, do indeed, as contended by the Collector of Revenue here, indicate inroads into the tax immune status of exclusively interstate activity. This was similarly the opinion of the Supreme Court of the State of New Jersey in the 1967 case of *Roadway Express, Inc. v. Director, Division of Taxation*, 50 N.J. 471, 236 A.2d 577 (1967). In *Roadway Express*, in sustaining the imposition of New Jersey's privilege tax upon a corporation conducting exclusively interstate business in the State, the New Jersey Supreme Court suggested that the United States Supreme Court majority opinion in *Spector* no longer characterized its (the United States Supreme Court's) attitude towards State taxation of interstate commerce and that *Spector* "remains authority at the very most, only in the precise statutory situation there found." 50 N.J. at 487, 236 A.2d at 585.

While the New Jersey court did sustain the tax because it was, unlike the case here before us, *in lieu* of all other State, County or local taxation upon or measured by intangible personal property,[5] the New Jersey Court went on further to conclude that the tax was additionally sustainable as a levy " 'for the privilege of * * * employing or owning capital or property, or maintaining an office, in this State,' " and also for " 'the privilege of * * * exercising its corporate franchise' " in the State of New Jersey. That Court concluded that such privileges are sufficiently different from that of "doing" interstate business such that they are aspects of business subject to the sovereign power of the State. 50 N.J. at 492, 236 A.2d at 588.

Appeal of *Roadway Express* from the Supreme Court of New Jersey was dismissed by the United States Supreme Court "for lack of a substantial Federal question." 390 U.S. 745, 20 L.Ed.2d 276, 88 S.Ct. 1443 (1968).

While the Supreme Court's dismissal of Roadway's appeal for lack of a substantial question may have been affected by the *in lieu* feature of the tax there involved, the major significance of the New Jersey decision "lies in its direct attack on tax immunity derived from the privilege of doing interstate business,"[6] particularly in its validating the imposition of an excise tax upon the privilege of exercising a corporate franchise, owning property, employing capital, and maintaining an office in a given state.

In a case the result of which was similar to that expressed

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[5] And, of course, such an "in lieu tax had specifically been sanctioned by the U. S. Supreme Court in Railway Express Agency v. Virginia, 358 U.S. 434, 79 S.Ct. 411, 3 L.Ed.2d 450 (1959).

[6] Hellerstein, State Taxation of Interstate Commerce: Roadway Express, the Diminishing Privilege Tax Immunity, and the Movement Toward Uniformity in Apportionment, 36 U.Chi.L.Rev. 186, 195 (1968).

in this opinion, the Tennessee Supreme Court in *Texas Gas Transmission Corp. v. Atkins*, 197 Tenn. 123, 270 S.W.2d 384, *cert. denied* 348 U.S. 883, 75 S.Ct. 125, 99 L.Ed. 694 (1954), held that despite the Supreme Court's proscription in *Spector* of a levy on the right to do interstate business, taxing the right to do business (even though exclusively interstate) in corporate form, not involved in *Spector*, was Constitutionally permissible. In that case, as in this decision, State excise and franchise taxes were held valid as applied to a foreign corporation engaged exclusively in the interstate transportation of gas by pipeline through Tennessee. *See also Mid Valley Pipeline Co. v. King*, 221 Tenn. 724, 431 S.W.2d 277 (1968), appeal dismissed for lack of a substantial question, 393 U.S. 321, 89 S.Ct. 556, 21 L.Ed 517 (1969).

Louisiana's corporation franchise tax statute, as amended by Act 325 of 1970, and as applied to foreign corporations doing only interstate business in Louisiana, taxes not the general privilege of doing interstate business but simply the corporation's privilege of enjoying in a corporate capacity the ownership or use of its capital, plant or other property in this state, the corporation's privilege of exercising and continuing its corporate charter in the State of Louisiana, and the corporation's use of its corporate form to do business in the State.

The corporation, including the foreign corporation doing only interstate business in Louisiana, enjoys under our laws many priviliges separate and apart from simply doing business, such for instance as the legal status to sue and be sued in the Courts of our State, continuity of business without interruption by death or dissolution, transfer of property interests by the disposition of shares of stock, advantages of business controlled and managed by corporate directors, and the general absence of individual liability, among others.

That the corporation enjoys power and privileges not

possessed by individuals or partnerships was long ago recognized by this Court. *Conway v. Lane Cotton Mills Co.*, 178 La. 626, 152 So. 312 (1933).

The fact that the corporate form of doing business is inextricably interwoven in a foreign corporation's doing interstate business in the State, does not in our view detract from the fact that the local incident taxed is the **form of doing business** rather than the business done by that corporation. And it is our view that the local incident is real and sufficiently distinguishable, so that taxation thereof does not, under the controlling decisions of the United States Supreme Court, violate the Commerce Clause.

The statute does not discriminate between foreign and local corporations, being applicable, as it is, to both. Nor do we believe that the State's exercise of its power by this taxing statute is out of proportion to Colonial's activities within the state and their consequent enjoyment of the opportunities and protection which the state has afforded them.

Furthermore we believe that the State has given something for which it can ask return. The return, tax levy in this case, is an exaction which the State of Louisiana requires as a recompense for its protection of lawful activities carried on in this state by Colonial, activities which are incidental to the powers and privileges possessed by it by the nature of its organization, here, as in *Memphis Natural Gas*, the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of their pipeline system throughout the 258 miles of its pipeline in the State of Louisiana.

We therefore find R.S. 47:601 et seq. to be a Constitutional exercise of the State of Louisiana's taxing power not unconstitutional under the Commerce Clause of the Federal Constitution.

Having reached this conclusion we turn now to Colonial's alternative plea, that in any event their tax obligation for the calendar year 1970 be limited to $10.00.

L.R.S. 47:611, reads as follows:

> "Every corporation shall pay only the minimum tax of ten dollars ($10.00) in the first accounting period or fraction thereof in which it becomes subject to the tax levied herein."

Under the 1970 amendment, the tax became effective for all taxable years beginning on or after December 31, 1969. Therefore, the first year that Colonial became subject to the tax under the statute was 1970, and could owe no greater tax during that year than the amount set forth in L.R.S. 47:611, above.

Colonial is correct in this position. The Collector of Revenue so concedes.

The corporation franchise tax paid by Colonial, recovery of which is sought in this litigation was:

For 1970, including interest to date of payment, $80,-835.02

For 1971, including interest to date of payment, $69,-884.78.

Inasmuch as Colonial is entitled to recover all but $10.00 of the sum paid for 1970, and inasmuch as we hold the tax valid and applicable for the year 1971, we are required to amend the judgment of the Court of Appeal.

Accordingly, for the foregoing reasons, the judgment of the Court of Appeal insofar as it held La. R.S. 47:601 as amended by Act No. 325 of 1970 unconstitutional is reversed, and the judgment in favor of Colonial Pipeline Co. and against

the Collector of Revenue, State of Louisiana is otherwise amended to reduce the principal amount thereof from $150,719.80 to $80,825.02; in other particulars judgment is affirmed.

Judgment reversed in part, amended in part and affirmed.

* * * * * *

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

NUMBER 9231

FEB 28 1973

COLONIAL PIPELINE COMPANY
Plaintiff-Appellee

versus

E. LEE AGERTON, COLLECTOR OF REVENUE
Defendant-Appellant

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF EAST BATON ROUGE, HONORABLE DANIEL W. LeBLANC, JUDGE PRESIDING

BEFORE: SARTAIN, BLANCHE AND WATSON, JJ.
SARTAIN, J.

This litigation involves the application of R.S. 47:601 (Franchise Tax) as amended by Act No. 325 of 1970.

The issues presented herein are identical to those presented in *Colonial Pipeline Company v. Mouton*, 228 So.2d 718 (1969), writs refused 231 So.2d 393.

The Collector of Revenue of the State of Louisiana (Collector) levied a "tax" on the plaintiff pursuant to the 1970

amendment. Colonial Pipeline Company (Colonial) paid the taxes under protest and instituted this action to recover the same.

The trial judge held that there was little, if any, difference between R.S. 47:601 (Act 373 of 1958) and the statute after its amendment. We affirm.

R.S. 47:601, as amended by Act 437 of 1958, read as follows:

"§ 01. Imposition of tax

"Every domestic corporation and every foreign corporation, exercising its charter, authorized to do or doing business in this state, or owning or using any part of all of its capital or plant in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this chapter, shall pay a tax at the rate of one dollar and 50/100 ($1.50) for each one thousand dollars ($1,000.00), or major fraction thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital, determined as hereinafter provided; the minimum tax shall not be less than ten dollars ($10.00) in any case. The tax levied herein is due and payable for the privilege of carrying on or doing business, the exercising of its charter or the continuance of its charter within this state, or owning or using any part or all of its capital or plant in this state.

The same section as amended by Act 325 of 1970 now reads:

"§ 601. Imposition of tax

"Every domestic corporation and every foreign corporation, exercising its charter, or qualified to do business or actually doing business in this state, or owning or using any part or all of its capital, plant or any other property in this state, subject to compliance with all other provisions of law, except as otherwise provided for in

this Chapter shall pay an annual tax at the rate of $1.50 for each $1,000.00, or major fraction thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital, determined as hereinafter provided; the minimum tax shall not be less than $10.00 per year in any case. The tax levied herein is due and payable on any one or all of the following alternative incidents:

"(1) The qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form. The term 'doing business' as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property.

"(2) The exercising of a corporation's charter or the continuance of its charter within this state.

"(3) The owning or using any part or all of its capital, plant or other property in this state in a corporate capacity.

"It being the purpose of this section to require the payment of this tax to the State of Louisiana by domestic corporations for the right granted by the laws of this state to exist as such an organization, and by both domestic and foreign corporations for the enjoyment, under the protection of the laws of this state, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation. **The tax hereby imposed shall be in addition to all other taxes levied by any other statute.** (Emphasis ours)

"As used herein the term 'domestic corporation' shall mean and include all corporations, or other business organizations organized under the laws of this state which have privileges, powers, rights or immunities not possessed by individuals or partnerships. The term 'foreign corporation' shall mean and include all such business organizations as hereinbefore described in this paragraph

which are organized under the laws of any other state, territory or district, or foreign country."

It was stipulated that Colonial's operations in the State of Louisiana have not changed since the first Colonial case.

The Collector argues that significant changes were made in the operating incidents of the statute. Further, that the alternative incidents (Sections 1 thru 3) are sufficient to support a valid application of the franchise tax upon Colonial.

In his written reasons for judgment the trial judge held, inter alia, that the three incidences in themselves are not sufficient and quoted *Colonial Pipeline v. Mouton*, 228 So.2d 718, 722, as follows:

> "This question has never been squarely presented to an appellate court of this state, to our knowledge, on any prior occasion. However, we are of the opinion that these privileges are not of a sufficient local nature as to subject Colonial to a franchise tax. The privilegs above enunciated are incidental to and in the furtherance of Colonial's primary object of transporting petroleum products in interstate commerce. The mere qualification to do business does not, per se, subject Colonial to the subject tax."

The major difference that we find in R.S. 47:601 is the removal of the statement "privilege to do business" and the addition of the "corporate form" incident. We believe this to be a distinction without a difference.

In the first Colonial case we made a comprehensive analysis of the cases involving the imposition of a franchise tax upon companies engaged in interstate commerce. First, we recognized that Congress has the exclusive power under the Commerce Clause to regulate interstate commerce and even where the Congress has failed to act on the subject in the area of taxation, the Commerce Clause requires that interstate commerce be free from any direct restrictions or impo-

sitions by the state. The clause itself is a limitation upon the power of the states by prohibiting any interference by the states.

We recognize that not all taxes are invalid. A state may require the payment of ad valorem taxes, a use tax, and a properly apportioned income tax. It is conceded that Colonial is paying these taxes to the State of Louisiana. In the first Colonial suit, we stated: (228 So.2d 718, 720)

> "[5, 6] However, in the area of franchise or excise taxes imposed by a state on a corporation engaged in interstate commerce, as a general rule, is invalid if the tax is on the 'privilege' of doing business. On the other hand, the tax is valid if it is determined that it is a tax on 'local activities' or an 'in lieu' tax. In *Freeman v. Hewit*, 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265, the court held that it is a question of law and fact and that the task of scrutinizing is the task of drawing lines and placing the facts on the proper side of the line which in turn dictate the categorization of the statute and place it in its proper niche, i.e., valid or invalid. The decisive issue in cases of this type turns on the operating incidence of the tax. *General Motors Corporation v. Washington*, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed. 2d 430."

It is apparent to us that we are again talking about a "corporate franchise tax" and the question posed for resolution is whether or not the operating incidents enumerated in the statute are sufficient to permit its imposition. We must conclude that they are not. Significantly, the statute as amended still contains the essential taxable incidents as it did before the amendment. More importantly, it is imposed "in addition to all other taxes levied by any other statute."

It can be readily seen that if each state in which a foreign corporation, engaged exclusively in interstate commerce, could impose a franchise tax based on that corporation's **total** capital stock, surplus, undivided profits, and borrowed captial,

the tax burden would be such as to literally prevent the corporation's interstate operation. It is for this basic reason that the Commerce Clause has been invoked to prevent such taxation. The exceptions are very carefully defined and are solely upon "local incidents" or what has been classified as "in lieu tax."

Counsel for the Collector cites several authorities which he contends sanction imposition of the tax herein considered. He principally relies on *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 68 S.Ct. 1475, 92 L.Ed. 1832 (1948); *Texas Gas Transmission Corporation v. Atkins*, 270 S.W. 2d 384 (1954); *Mid-Valley Pipeline v. King*, 431 S.W. 2d 277 (1968); *Great Lakes Pipeline v. Oklahoma Tax Commission*, 231 P.2d 675 (1951); and *Roadway Express, Inc. v. Director, Division of Tax*, 236 A.2d 577.

In *Memphis Natural Gas Company*, Mississippi Code, Section 9313 and 9314 specifically assessed a tax upon the "capital used, invested or employed . . . within this state, . . . ". Our R.S. 47:601 imposes a tax upon the total corporate structure of Colonial. In *Texas Gas Transmission Corporation*, the Tennessee tax there under consideration was on the "net earnings for the next preceding year, from business done in Tennessee." In *Mid-Valley Pipeline*, the Supreme Court of Tennessee properly recognized that its tax was an apportioned excise tax on corporate earnings from business done within the state and that "local incidence or activities may be a basis for a franchise tax, provided the local activities can be separated from interstate commerce." *Roadway Express, Inc.* involved the interpretation of a New Jersey statute imposing a "franchise tax." However, it is noted that the tax there imposed was *in lieu of* all other state, county or local taxes. The measure of the tax was determined by an allocation formula.

The Collector further argues that in the first Colonial

case we limited our decision there to the very narrow issue as to whether R.S. 47:601 then under consideration (Act No. 373 of 1958) levied a tax "squarely upon the privilege of engaging in business in Louisiana." This we concede but we also stated in the first Colonial case that Louisiana could levy a tax *in lieu of* other taxes, on tangibles or intangibles (good will) or local incidents or local activities. We again adhere to that statement but again the undeniable fact is that the three incidences now urged are nothing more than a rephrasing of the general language contained in R.S. 47:601 prior to its amendment in 1970.

Accordingly, for the above and foregoing reasons, the judgment of the District Court is affirmed. All such costs as authorized by law are assessed against the defendant.

AFFIRMED.

* * * * *

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 15th day of February, 1974, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS REFUSED:

53,552 *Colonial Pipeline Co. v. Agerton, Collector*, etc.

Appendix B

NOTICES OF APPEAL

SUPREME COURT OF LOUISIANA

No. 53,552

FILED: MARCH 28, 1974

COLONIAL PIPELINE COMPANY,

Plaintiff-Appellant

versus

E. LEE AGERTON, COLLECTOR OF REVENUE,

Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Colonial Pipeline Company, Plaintiff-Appellant, named above, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Louisiana reversing the judgment of the Louisiana Court of Appeal, First Circuit, and refusing to hold that L.R.S. 47:601, as amended by Act 325 of 1970, is unconstitutional by reason of conflict with the Commerce Clause of the United States Constitution, which judgment was entered in this action on January 14, 1974.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

The following question is presented by this appeal:

Whether the Louisiana Corporation Franchise Tax upon the privilege of doing business in any form can be constitu-

tionally levied upon a foreign corporation engaged exclusively in interstate commerce in Louisiana.

By Attorneys,

R. Gordon Kean, Jr. — of
SANDERS, MILLER, DOWNING & KEAN
Post Office Box 1588
Baton Rouge, Louisiana 70821

Attorney for Colonial Pipeline Company, Plaintiff-Appellant

PROOF OF SERVICE

The undersigned, one of the attorneys for Colonial Pipeline Company, plaintiff-appellant herein and a member of the Bar of the Supreme Court of the United States hereby certifies that on the 27th day of March, 1974, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Joseph N. Traigle, Successor in office to E. Lee Agerton, Collector of Revenue, defendant-appellee herein, by mailing a copy of the name in an addressed envelope with postage prepaid to his counsel of record, Whit M. Cook II, State of Louisiana, Department of Revenue, Legal Division, Post Office Box 201, Baton Rouge, Louisiana 70821.

Baton Rouge, Louisiana, this 27th day of March, 1974.

R. Gordon Kean, Jr.

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19TH JUDICIAL DISTRICT COURT

PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

DIVISION "H"

NO. 152,892

FILED: MARCH 28, 1974

COLONIAL PIPELINE COMPANY,
Plaintiff-Appellant

versus

E. LEE AGERTON, COLLECTOR OF REVENUE,
Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Colonial Pipeline Company, Plaintiff-Appellant, named above, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Louisiana reversing the judgment of the Louisiana Court of Appeal, First Circuit, and refusing to hold that L.R.S. 47:601, as amended by Act 325 of 1970, is unconstitutional by reason of conflict with the Commerce Clause of the United States Constitution, which judgment was entered in this action on January 14, 1974.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

The following question is presented by this appeal:

Whether the Louisiana Corporation Franchise Tax upon the privilege of doing business in any form can be constitu-

tionally levied upon a foreign corporation engaged exclusively in interstate commerce in Louisiana.

By Attorneys,

R. Gordon Kean, Jr. — of

SANDERS, MILLER, DOWNING & KEAN
Post Office Box 1588
Baton Rouge, Louisiana 70821

Attorney for Colonial Pipeline Company, Plaintiff-Appellant

PROOF OF SERVICE

The undersigned, one of the attorneys for Colonial Pipeline Company, plaintiff-appellant herein and a member of the Bar of the Supreme Court of the United States hereby certifies that on the 27th day of March, 1974, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Joseph N. Traigle, Successor in office to E. Lee Agerton, Collector of Revenue, defendant-appellee herein, by mailing a copy of the same in an addressed envelope with postage prepaid to his counsel of record, Whit M. Cook II, State of Louisiana, Department of Revenue, Legal Division, Post Office Box 201, Baton Rouge, Louisiana 70821.

Baton Rouge, Louisiana, this 27th day of March, 1974.

R. Gordon Kean, Jr.

Appendix C

STATUTES INVOLVED

The following sections of Title 47 of the Louisiana Revised Statutes are involved in this case:

§ 401. Failure to pay tax; judgment prohibiting further pursuit of business

Failure to pay the tax levied by this Chapter shall ipso facto, without demand or putting in default, cause the tax, interest, penalties and costs to become immediately delinquent, and the collector of revenue is hereby vested with authority, on motion in a court of competent jurisdiction, to take a rule on the delinquent taxpayer to show cause in not less than two nor more than ten days, exclusive of holidays, why the delinquent taxpayer should not be ordered to cease from further pursuit of the business taxed under this Chapter. This rule may be tried out of term and in chambers, and shall always be tried by preference. If the rule is made absolute, the order therein rendered shall be considered a judgment in favor of the state prohibiting the taxpayer from the further pursuit of the business until such time as he has paid the delinquent tax, interest, penalties and costs, and every violation of the injunction shall be considered a contempt of court, and punished according to law.

§ 601. Imposition of tax (before 1970 amendment)

Every domestic corporation and every foreign corporation, exercising its charter, authorized to do or doing business in this state, or owning or using any part or all of its capital or plant in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this chapter shall pay a tax at the rate of one dollar and 50/100 ($1.50) for each one thousand dollars ($1,000.00), or major fraction

thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital, determined as hereinafter provided; the minimum tax shall not be less than ten dollars ($10.00) in any case. The tax levied herein is due and payable for the privilege of carrying on or doing business, the exercising of its charter or the continuance of its charter within this state, or owning or using any part or all of its capital or plant in this state.

Amended by Acts 1958, No. 437.

§ 601. Imposition of tax (After 1970 Amendment)

Every domestic corporation and every foreign corporation, exercising its charter, or qualified to do business or actually doing business in this state, or owning or using any part or all of its capital, plant or any other property in this state, subject to compliance with all other provisions of law, except as otherwise provided for in this Chapter shall pay an annual tax at the rate of $1.50 for each $1,000.00, or major fraction thereof on the amount of its capital stock, surplus, undivided profits, and borrowed capital, determined as hereinafter provided: the minimum tax shall not be less than $10.00 per year in any case. The tax levied herein is due and payable on any one or all of the following alternative incidents:

(1) The qualification to carry on or do business in this state or the actual doing of business within this state in a corporate form. The term "doing business" as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in this state, as an incident to or by virtue of the powers and privileges acquired by the nature of such organization, as well as, the buying, selling or procuring of services or property.

(2) The exercising of a corporation's charter or the continuance of its charter within this state.

(3) The owning or using any part or all of its capital, plant or other property in this state in a corporate capacity.

It being the purpose of this section to require the payment of this tax to the State of Louisiana by domestic corporations for the right granted by the laws of this state to exist as such an organization, and by both domestic and foreign corporations for the enjoyment, under the protection of the laws of this state, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation. The tax hereby imposed shall be in addition to all other taxes levied by any other statute.

As used herein the term "domestic corporation" shall mean and include all corporations, joint stock companies or associations, or other business organizations organized under the laws of this state which have privileges, powers, rights or immunities not possessed by individuals or partnerships. The term "foreign corporation" shall mean and include all such business organizations as hereinbefore described in this paragraph which are organized under the laws of any state, territory or district, or foreign country.

Amended by Acts 1970, No. 325.

§ 606. Allocation of taxable capital

A. General allocation formula. For the purpose of ascertaining the tax imposed in this Chapter, every corporation subject to the tax is deemed to have employed in this state the proportion of its entire issued and outstanding capital stock, surplus, undivided profits and borrowed capital, computed on the basis of the ratio obtained by taking the arithmetical average of the following ratios:

(1) The ratio that the net sales made to customers in the regular course of business and other revenue attributable

to Louisiana bears to the total net sales made to customers in the regular course of business and other revenue. For the purposes of this Sub-section net sales and other revenues attributable to Louisiana shall be determined as follows:

(a) Sales attributable to this state shall be all sales where the goods, merchandise or property are received in this state by the purchaser. In the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place at which the goods are ultimately received after all transportation has been completed shall be considered as the place at which the goods are received by the purchaser. However, direct delivery into this state by the taxpayer to a person or firm designated by a purchaser from within or without the state shall constitute delivery to the purchaser in this state. Revenue derived from a sale of property not made in the regular course of business shall not be considered.

(b) Revenues attributable to this state derived from air transportation shall include all gross receipts from passenger journeys and cargo shipments originating in Louisiana.

(c) Revenues attributable to this state derived from transportation of crude petroleum, natural gas, petroleum products or other commodities for others through pipelines shall include all gross revenue derived from operations entirely within this state plus a portion of any revenue from operations partly within and partly without this state, based upon the ratio of the number of units of transportation service performed in Louisiana in connection with such revenue to the total of such units. A unit of transportation service shall be the transporting of any designated quantity of crude petroleum, natural gas, petroleum products or other commodities for any designated distance.

(d) Revenues attributable to this state derived from

transportation other than aircraft or pipeline shall include all such income that is derived entirely from sources within this state, and a portion of revenue from transportation partly without and partly within this state, to be prorated subject to rules, and regulations of the collector, which shall give due consideration to the proportion of service performed in Louisiana.

(e) Revenues from services other than those described above shall be attributed within and without Louisiana on the basis of the location at which the services are rendered.

(f) Rents and royalties from immovable or corporeal movable property, shall be attributed to the state where such property is located at the time the revenue is derived.

(g) Interest on customers' notes and accounts shall be attributed to the state in which such customers are located.

(h) Other interest and dividends shall be attributed to the state in which the securities or credits producing such revenue have their situs, which shall be at the business situs of such securities or credits, if they have been so used in connection with the taxpayer's business as to acquire a business situs, or, in the absence of such a business situs shall be at the commercial domicile of the corporation.

(i) Royalties or similar revnue from the use of patents, trade marks, copyrights, secret processes and other similar intangible rights shall be attributed to the state or states in which such rights are used.

(j) Revenues from a parent or subsidiary corporation shall be allocated as provided in Sub-section B of this Section.

(k) All other revenues shall be attributed within and without this state on the basis of such ratio or ratios, prescribed by the collector, as may be reasonably applicable to the type of revenues and business involved.

(2) The ratio that the value of all of the taxpayer's property and assets situated or used in Louisiana bears to the value of all of its property and assets wherever situated or used. In determining value, depreciation and depletion reserves must be deducted from the book values of the properties in question. The various classes of property and assets shown below shall be allocated within and without Louisiana on the bases indicated:

(a) Cash shall be allocated to the state in which located.

(b) Cash in banks and temporary cash investments shall be allocated to the state in which they have their business situs, or in the absence of a business situs, to the state in which is located the commercial domicile of the taxpayer.

(c) Trade accounts and trade notes receivable shall be allocated by reference to the transactions from which the receivables arose, on the basis of the location at which delivery was made in the case of sale of merchandise or the location at which the services were performed in case of charges for services rendered.

(d) Investments in and advances to a parent or subsidiary shall be allocated as provided in Sub-section B of this Section.

(e) Notes and accounts other than those notes and accounts described under items (b) through (d) above shall be allocated to the state in which they have their business situs, or in the absence of a business situs, to the state in which is located the commercial domicile of the taxpayer.

(f) Stocks and bonds not included in (b) or (d) above shall be allocated to the state in which they have their business situs or in the absence of a business situs to the state in which is located the commercial domicile of the taxpayer.

(g) Immovable and corporeal movable property shall be allocated within and without Louisiana on the basis of actual location. Corporeal movable property of a class which is not normally located within a particular state the entire taxable year shall be allocated within and without Louisiana by use of a ratio which shall give due consideration to the usage within and without this state. Mineral leases and royalty interests shall be allocated to the state in which the property covered by the lease or royalty interest is located.

(h) All other assets shall be allocated within or without Louisiana on the basis, prescribed by the collector, as may reasonably be applicable to the assets and the type of business involved.

B. Allocation of intercompany items. For the purpose of allocation, investments in, advances to, or revenues from a parent or subsidiary corporation shall be allocated to Louisiana on the basis of the percentage of capital employed in Louisiana for corporation franchise tax purposes by the parent or subsidiary corporation. A subsidiary corporation is any corporation the majority of the capital stock of which is actually, wholly or substantially owned by another corporation and whose management, business policies and operations are, howsoever, actually, wholly or substantially controlled by another corporation; which latter corporation shall be termed the parent corporation.

C. Minimum allocation; assessed value of real and personal property. The portion of capital stock, surplus, undivided profits and borrowed capital allocated for franchise taxation under this Chapter shall in no case be less than the total assessed value of real and personal property in this state of each such domestic or foreign corporation for the calendar year preceding that in which the tax is due.

§ 1501. Definitions

The terms "Collector" or "Collector of Revenue" when used in this Title mean the Collector of Revenue for the State of Louisiana. The term "Sub-title" means and includes all the chapters in Sub-title II of this Title 47 and any other Chapter of these Revised Statutes, the administration of which has been delegated to the Collector of Revenue.

§ 1561. Alternative remedies for the collection of taxes

In addition to following any of the special remedies provided in the various Chapters of this Sub-title, the collector may, within his discretion, proceed to enforce the collection of any taxes due under this Sub-title, by means of any of the following alternative remedies or procedures:

(1) Assessment and distraint, as provided in R.S. 47:1562 through 47:1573.

(2) Summary court proceeding, as privided in R.S. 47:1574.

(3) Ordinary suit under the provisions of the general laws regulating actions for the enforcement of obligations.

The collector may choose which of these procedures he will pursue in each case, and the counter-remedies and delays to which the taxpayer will be entitled will be only those which are not inconsistent with the proceeding initiated by the collector; provided that in every case the taxpayer shall be entitled to proceed under R.S. 47:1576 except after he has filed a petition with the board of tax appeals for a redetermination of the assessment, and except when there is pending against him a suit involving the same tax obligation; and provided further, that the fact that the collector has initiated proceedings under the assessment and distant procedure will not preclude him from thereafter proceeding by summary or ordinary

court proceedings for the enforcement of the same tax obligation.

§ 1576. Payment of tax under protest; remedy at law for recovery

A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest or other charges imposed in this Sub-title. The person resisting the payment of any amount found due by the collector, or of enforcement of any provisions of this Sub-title, shall pay the amount found due to the collector and at that time shall give the collector notice of his intention to file suit for the recovery therof. Upon receipt of this notice, the amount paid shall be segregated and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds segregated shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the collector to the date of refund.

This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Sub-title, as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such action, service of process upon the collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

This Section shall be construed to provide a legal remedy in the state or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act

of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

Upon request of a person and proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, such person, upon agreement to abide by the decision of the courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the collector until the question of law involved has been determined by the courts and shall then be disposed of as therein provided.

§ 1641. Criminal penalty for failing to account for state tax money

Any person required under this Sub-title to collect, account for, or pay over any tax, penalty, or interest imposed by this Sub-title, who wilfully fails to collect or truthfully account for or pay over such tax, penalty or interest, shall in addition to other penalties provided by law, be guilty of a felony and shall be fined not more than ten thousand dollars ($10,000.00) or imprisoned for not more than five years, or both.